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Supreme Court, U.S.
FILED

061463 MAY 4 - 2007

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No. 06-

IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

JOSEPH D. SCHLEIMER
SCHLEIMER & FREUNDLICH LLP
9100 Wilshire Boulevard
Suite 615 - East Tower
Beverly Hills, California 90212
(310) 273-9807

Counsel of Record for Petitioner

QUESTION PRESENTED

Whether the Federal Arbitration Act and *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S.Ct. 1204 (2006) preempt the holding in this case, voiding an interstate arbitration agreement under the California Talent Agencies Act?

PARTIES

The parties to this proceeding are Petitioner Arnold M. Preston and Respondent Alex E. Ferrer.

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Petitioner Arnold M. Preston respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal, *review denied* by the California Supreme Court, on the issue of Federal preemption.

OPINIONS BELOW

The *Order Denying Review* by the California Supreme Court is set forth at Petitioner's Appendix ("Pet. App.") 1a.

The *Majority Opinion* of the California Court of Appeal was reported as *Ferrer v. Preston* (2006) 145 Cal.App.4th 440, 51 Cal.Rptr.3d 628. The Opinion is set forth hereinbelow at Pet. App. 2a–12a.

The *Dissenting Opinion* of the Hon. Miriam A. Vogel, Justice, California Court of Appeal, is set forth at Pet. App. 12a–18a.

The *Memorandum Decision* by the Hon. Haley J. Fromholz, Judge, Los Angeles Superior Court, is set forth at Pet. App. 18a–27a.

JURISDICTION

The decision of the California Courts was final upon the denial of review by the California Supreme Court, entered on February 14, 2007. (Pet. App. 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as it involves an issue of Federal preemption under the Supremacy Clause of the U.S. Constitution (Article VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. §2. *See, Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852 (1984).

STATUTES

The Federal Arbitration Act, 9 U.S.C. §2, states, in pertinent part:

> "A written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...or the refusal to perform the whole or any part thereof....shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The California Talent Agencies Act, Labor Code §1700.44(a), states, in pertinent part:

> "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard *de novo*."

STATEMENT OF THE CASE

Respondent Alex E. Ferrer ("Judge Ferrer") is a former Florida Circuit Court Judge who now makes his living as the star of *Judge Alex*, a television program syndicated nationwide by Twentieth Century Fox, in which Judge Ferrer arbitrates petty civil disputes as a form of entertainment. (Pet. App. 3a).

Petitioner Arnold M. Preston ("Preston") is an attorney, who now makes his living as an Artist's Manager, advising and

counseling artistic personnel in the motion picture/television industry. (Pet. App. 12a).

Mr. Preston and Judge Ferrer entered into a written contract ("Management Agreement") which provides for payment of a 12% fee on Judge Ferrer's earnings from *Judge Alex*. (Pet. App. 3a). The Management Agreement included a standard American Arbitration Association provision calling for arbitration of disputes. (Pet. App. 6a). The arbitration clause specifically provided that disputes about the "validity" and "legality" of the contract would be subject to arbitration. (Pet. App. 6a).

Judge Ferrer resides in Florida and tapes the *Judge Alex* television program in Texas. Mr. Preston had his office in California. (Pet. App. 11a). As it happened, Judge Ferrer was in Nevada when he signed the Management Agreement. (Pet. App. 11a). As such, the *interstate* nature of the contract has never been in dispute.

When *Judge Alex* went on the air, Judge Ferrer refused to pay the management fee, so Mr. Preston commenced a proceeding with the American Arbitration Association in Los Angeles, California. (Pet. App. 3a). Ferrer responded by filing an action with the California Labor Commissioner, challenging the legality of the *entire management contract* under the California Talent Agencies Act, and based thereon, he asked the Labor Commissioner to stay the arbitration. (Pet. App. 3a).

The Labor Commissioner's hearing officer determined she lacked the power to stay the pending arbitration, so Judge Ferrer filed an action in the Los Angeles Superior Court, seeking an injunction against the arbitration. (Pet. App. 4a). The Superior Court issued the injunction, stayed the arbitration, and ordered that the legality of the entire contract under the

Talent Agencies Act would be decided by the Labor Commissioner, not the Arbitrator. (Pet. App. 4a). There was no challenge to the arbitration clause itself and Judge Ferrer initialed every page of the contract. (Pet. App. 13a, 14a).

The California Court of Appeal affirmed in a 2-1 decision. The dissenting opinion by Justice Miriam A. Vogel argued that the Federal Arbitration Act (9 U.S.C. §2) and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006) ("*Buckeye*") preempted the majority decision, stating:

> "Because it is undisputed (correctly) that the contract before us is governed by the FAA...it follows necessarily that the arbitrator and not the court must determine the gateway issues. My colleagues' contrary conclusion – based on the fact that the *Buckeye* court did not consider whether the issue should go first to a state administrative agency – ignores *Buckeye's* holding that its rules trump conflicting state procedures." (Pet. App. 16a; *Ferrer v. Preston, supra*, 145 Cal.App.4th at 451 n.3, 51 Cal.Rptr.3d at 637 n.3).

The majority of the Court of Appeal did not dispute the applicability of the Federal Arbitration Act, but distinguished *Buckeye* on the grounds that the Talent Agencies Act vests initial jurisdiction in an *administrative agency* , whereas *Buckeye* involved an attempt to avoid arbitration by filing a lawsuit in a Court:

> "[Preston] argues that the Federal Arbitration

> Act...preempts California law requiring the Commissioner to first adjudicate the legality of the contract....¶*Buckeye* is inapposite...[because it] did not involve an administrative agency...[and] did not consider whether the FAA preempts application of the exhaustion doctrine." (Pet. App. 10a; *Ferrer v. Preston, supra*, 145 Cal.App.4th at 441, 51 Cal.Rptr.3d at 633–634)

The California Supreme Court denied Mr. Preston's Petition for Review without issuing an opinion. (Pet. App. 1a).

Decisions of the California Labor Commissioner are subject to a trial *de novo* in the Superior Court pursuant to California Labor Code §§ 98.2 and 1700.44(a). See, *Sinnamon v. McKay* (1983) 142 Cal.App.3d 847. As such, the Labor Commissioner hearing is just an *initial step* in a protracted adjudication process which usually winds up, like this case did, in the California Court system.

As it stands, pursuant to the California decision this case would be remanded to the Labor Commissioner, where an administrative hearing would be conducted on the legality of the entire contract, followed by a trial *de novo* in the Superior Court on the same issue, followed by another appeal.

Thus, absent a writ of certiorari, Mr. Preston's arbitration will ultimately take place *four to five years* after filing his original petition, and only after incurring oppressive legal fees litigating before the Labor Commissioner, *de novo* in the Superior Court, and a second time before the California appellate courts.

REASONS FOR GRANTING CERTIORARI

Since the Court of Appeal's decision was published, and review was denied by the California Supreme Court, this established a *controlling precedent* in California which effectively renders arbitration agreements in Artist's Manager contracts unenforceable.

The Artist's Manager profession is engaged in interstate commerce because the entertainment industry is national. As such, the anti-arbitration ruling in this case impacts the entire profession, including Artist's Managers located outside of California who represent clients who reside in California or obtain employment in California. Since a very large part of the entertainment industry is centered in California, this means that Artist Managers *nationwide* are adversely affected by California's anti-arbitration ruling.

The reasoning of the Court of Appeal also sets a precedent which can negate *Buckeye* and invalidate arbitration agreements under state law merely by inserting an administrative proceeding ahead of a decision by the Courts.

Nothing in *Buckeye* supports the Court of Appeal's conclusion that preemption under the Federal Arbitration Act vanishes merely because there is an administrative tribunal which acts as a precursor to litigation in the Courts. In the present case, the "exhaustion" doctrine means only that an expensive administrative proceeding will be conducted *before* the matter starts winding its way through the California Courts.

Petitioner submits the Court of Appeal's rationale is simply not a logical basis for avoiding Federal preemption. As stated in *Buckeye*, 546 U.S. 440, 126 S.Ct. at 1209:

> "[A]n arbitration provision is severable from the remainder of the contract....[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance....[T]his arbitration law applies in state as well as federal courts....[B]ecause respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court."

See, also, *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984)(California law voiding arbitration clause preempted by Federal Arbitration Act); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967).

This Petition involves a matter of great importance to the *entire profession of Artist's Managers*, who are engaged in interstate commerce but have now been deprived of their right to arbitrate under the Federal Arbitration Act.

Congress' goal in enacting the Federal Arbitration Act was to provide for the efficient, expeditious, and economical resolution of disputes. As illustrated by this case, that goal is utterly defeated by denying the arbitral forum based on state law. As stated by Justice Vogel, in her dissent:

> "When a former judge and a lawyer enter a contract in which they agree that any dispute about that contract will be resolved by arbitration, I think they ought to be bound by that agreement....¶Instead of the speedy, efficient, and relatively inexpensive procedure

> contemplated by the parties' contract, my colleagues have permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures....That is not how it is supposed to work." (Pet. App. 12a, 17a)

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal and the Supreme Court of California

Respectfully submitted,

JOSEPH D. SCHLEIMER
SCHLEIMER & FREUNDLICH LLP
9100 Wilshire Boulevard
Suite 615 -East Tower
Beverly Hills, California 90212
(310) 273-9807

Counsel of Record for Petitioner

APPENDIX

Appendix A

In The Supreme Court of California
En Banc

No. S149190

ALEX E. FERRER,

Plaintiff and Respondent

v.

ARNOLD M. PRESTON,

Defendant and Appellant

Petition for review DENIED.

George, Chief Justice

February 14, 2007

Appendix B

California Court of Appeal
Second Appellate District
Division 1

ALEX E. FERRER,

Plaintiff and Respondent,

v.

ARNOLD M. PRESTON,

Defendant and Appellant.

B188997

Decided: November 30, 2006

APPEAL from an order of the Superior Court of Los Angeles County, Haley J. Fromholz, Judge. Affirmed.

Schleimer & Freundlich and Joseph D. Schleimer, Beverly Hills, for Defendant and Appellant.

Mitchell, Silberberg & Knupp, Ronald A. DiNicola, Douglas W. Bordewieck, Kirsten E. Miller and Robert M. Dudnik, Los Angeles, for Plaintiff and Respondent.

INTRODUCTION

The defendant, Arnold M. Preston, appeals from an order denying his motion to compel arbitration and granting a motion by the plaintiff, Alex E. Ferrer, for a preliminary injunction and a stay of the action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is an attorney who renders services for personnel in the motion picture-television industry. Plaintiff is a former Florida Superior Court Judge, who now works arbitrating legal disputes on the television program, *Judge Alex*, on the Fox television network. Defendant contends that plaintiff breached a written agreement by failing to pay defendant certain fees based on plaintiff's earnings from his performance in *Judge Alex*.

On March 7, 2002, plaintiff signed a management contract with defendant, and the contract contained a standard American Arbitration Association (AAA) arbitration clause. On June 10, 2005, defendant initiated an arbitration proceeding against plaintiff, seeking to recover the fees to which he claimed he was entitled. On July 1, 2005, plaintiff filed a motion to stay the arbitration with the arbitrator. Plaintiff also filed a Petition to Determine Controversy (Petition) with the Labor Commissioner (Commissioner) and a motion asking the Commissioner to stay the arbitration. Defendant thereafter filed a motion to dismiss the Petition with the Commissioner. On October 12, 2005,

the arbitrator issued an order denying plaintiff's motion to stay the arbitration.

On November 2, 2005, plaintiff filed the instant complaint containing two causes of action, one for a declaration that the dispute involving the validity of the contract is not subject to arbitration, and the second for injunctive relief, seeking to restrain defendant from proceeding with the arbitration. On November 8, 2005, defendant filed a motion with the trial court to compel arbitration. On the same day, the Commissioner denied defendant's motion to dismiss plaintiff's petition. The Commissioner also denied plaintiff's motion to stay the arbitration, "on the grounds that the Labor Commissioner does not have the authority to stay arbitration proceedings." On November 10, 2005, plaintiff filed with the trial court a motion for preliminary injunction, attempting to restrain the defendant from proceeding with the arbitration unless and until the Commissioner determined that he had no further jurisdiction over the parties' dispute.

Plaintiff also filed a motion for reconsideration with the arbitrator. On December 6, 2005, the arbitrator granted the motion for reconsideration and stayed the arbitration pending disposition of the matter before the Commissioner.

On December 7, 2005, the trial court issued its order, denying defendant's motion to compel arbitration and granting plaintiff's motion for a preliminary injunction and staying the action pending final

resolution by the Commissioner of the Petition. The defendant has appealed from this order.

DISCUSSION

1. The Talent Agencies Act

The Talent Agencies Act (Act) (Lab. Code, § 1700 et seq.)[1] regulates the activities of a "talent agency," i.e., "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists . . . ." (§ 1700.4, subd. (a).) Artists include persons rendering professional services in television enterprises. (*Id.*, subd. (b).)

Section 1700.44, subdivision (a), of the Act states that "[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo."

Section 1700.5 of the Act states that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." The plaintiff contends that defendant was an unlicensed talent agent, and therefore their agreement is void and defendant is barred from

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[1] All statutory references hereinafter are to the Labor Code.

recovering the compensation he is seeking under the contract. The defendant asserts that he was acting as a personal manager, not as a talent agent, and he is not barred from recovering compensation for his services.

The question before us is who has original jurisdiction to make the determination as to the validity of the parties' contract. Defendant contends that the question of the contract's validity should be determined by the arbitrator, and the trial court therefore erred in refusing to compel arbitration. We disagree.

The parties' contract included a standard AAA arbitration clause, including a stipulation that the parties are to arbitrate any attack on the "validity or legality" of the contract. However, as interpreted by the courts, section 1700.44, subdivision (a), vests exclusive original jurisdiction in the Commissioner to resolve issues arising under the Act—including the issue of whether or not an individual such as defendant is a personal manager or an unlicensed talent agent. In *Styne v. Stevens* (2001) 26 Cal.4th 42 (*Styne*), the Supreme Court held that the Commissioner's exclusive original jurisdiction applies even where the Act is first raised by the artist as a defense to a claim for breach of contract by the personal manager/talent agent. (*Id.* at pp. 58-59.) In the present case, defendant asserted a claim that plaintiff had breached his contract and plaintiff submitted a Petition to Determine Controversy to the Commissioner to determine the issue of whether the contract involved the services of a talent agency. The Commissioner found that plaintiff had raised a "colorable" defense to defendant's claims, based on an alleged violation of the Act. The administrative

procedures before the Commissioner must be resolved before resort may be had to another tribunal. Contrary to defendant's suggestion, the fact that plaintiff is a sophisticated individual, with significant legal experience does not alter the decision of *Styne* or the procedure to follow.

As explained in *Styne v. Stevens*, *supra*, 26 Cal.4th at page 58, it is appropriate for the Commissioner to resolve the dispute between the parties, for "[t]he Commissioner's expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency for an artist." In addition, "the Commissioner['s]...interpretation of a statute he is charged with enforcing deserves substantial weight." (At p. 53.) In the present case, defendant commenced an arbitration seeking damages for breach of contract. In *Styne*, the action was initiated in superior court. We find the distinction to be of no consequence.

The trial court here correctly applied *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347 (*Buchwald*) in refusing to order arbitration and staying the proceedings until the Commissioner resolved the question before him. The facts of *Buchwald* are on point to the case at bar. In *Buchwald*, the rock band known as "Jefferson Airplane" claimed that section 1700.44 made their contract with their manager, Matthew Katz (Katz), void because the manager had obtained employment for them without being licensed as a talent agent. Katz sought arbitration based upon an arbitration clause in his contract. The band filed a Petition to Determine Controversy with the Commissioner, contending that Katz was an unlicensed talent agent. The band also brought an action in superior court, attempting to prevent Katz from proceeding with arbitration. (*Id.* at pp. 351-353.)

The Court of Appeal held that the Commissioner had exclusive original jurisdiction over the controversy based upon the band's petition, and that the exhaustion doctrine applied. (*Id.* at p. 359.) In the present case, defendant sought to compel arbitration with plaintiff. Then plaintiff sought an order staying the arbitration and sought to require defendant to exhaust his administrative remedies before the Commissioner. As in *Buchwald*, the trial court properly granted plaintiff's request.

Defendant is unable to distinguish the facts in the present case from the facts in *Buchwald* and attempts to argue that *Buchwald* is no longer good law and has been overruled by *Styne*. However, the *Styne* opinion repeatedly cites *Buchwald*. Defendant relies on footnote 9 in *Styne* in support of the argument that *Buchwald* has been overruled. *Styne* at footnote 9 states that "the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner. (§ 1700.45.) Nothing in our reasoning restricts this right." (*Styne*, *supra*, 26 Cal.4th at p. 59, fn. 9.)

The footnote makes reference to section 1700.45 of the Act, entitled "Contract provision for arbitration; Provisions prerequisite to validity." *Styne* did not involve a contract containing an arbitration clause, so the Court did not consider whether the prerequisites of section 1700.45 were met.[2] To be valid under section 1700.45, the contract must

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[2] In relevant part, section 1700.45 states:

"Notwithstanding Section 1700.44, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

satisfy either subdivisions (a) or (b), and it must also satisfy subdivisions (c) and (d). The contract between plaintiff and defendant does not satisfy subdivisions (c) or (d), in that it does not provide for notice to the Commissioner of all arbitration proceedings or give the Commissioner the right to attend the hearings.

Defendant further argues that *Buchwald* is not applicable because it was decided under a repealed statute, the "Artists' Managers Act." Defendant claims that the current Act eliminated the requirement that managers must have a license. The argument is not well taken. The Artists' Managers Act and the Talent Agencies Act are very similar in relevant aspects. While they differ slightly in the definitions of "artists' manager" and "talent agent,"[3] sections

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"(a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment, or

"(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency, and

"(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

"(d) If the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings."

[3] Section 1700.4 of the Artists' Managers Act defined artists' managers as follows: "An artists' manager is hereby defined to be a person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist."

Section 1700.4, subdivision (a), of the Talent Agencies Act provides as follows: "'Talent agency' means a person or corporation who

1700.44 and 1700.45 of both acts are identical in relevant points.

While defendant argues that he is a manager and not required to obtain a license, the Commissioner denied defendant's motion to dismiss for lack of subject matter jurisdiction, indicating that "this case presents a colorable basis for the exercise of the Labor Commissioner's jurisdiction and therefore, the matter must be submitted to the Labor Commissioner for determination." This being the case, the questions as to whether defendant is a talent agent and whether his contract with plaintiff is valid properly are submitted to the Commissioner in the first instance.

2. Federal Preemption

Defendant also argues that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) preempts California law requiring the Commissioner to first adjudicate the legality of the contract. Defendant relies on the case of *Buckeye Check Cashing, Inc. v. Cardegna* (2006) ___ U.S. ___ [126 S.Ct. 1204] (*Buckeye*).

Buckeye is inapposite, however. *Buckeye* did not involve an administrative agency with exclusive jurisdiction over a disputed issue. *Buckeye* did not consider whether the FAA preempts application of the exhaustion doctrine. *Buckeye* held, as between a court and an arbitrator, the

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engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers."

arbitrator and not the court hears "a challenge to the validity of the contract as a whole." (*Buckeye, supra*, ___ U.S. at p. ___ [126 S.Ct. at p. 1210].) *Buckeye* did not discuss whether a challenge to a contract as a whole should first have been made to an administrative agency where there is a statute vesting the agency with exclusive original jurisdiction to decide a challenge based on specific grounds.

3. *California Labor Code's Application to the Dispute*

Defendant finally argues that the California Labor Code does not apply, on the theory that plaintiff lives and works outside of California.[4] However, defendant lives and works in California, he signed the contract in California, and he instituted arbitration in California. In addition, the contract contains a choice of law clause stating that "[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein." Defendant's argument is without merit.

CONCLUSION

While there is a strong public policy in favor of contractual arbitration (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th, 1, 9; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702), the *Buchwald* case is very clear and requires the Commissioner to determine first the issue of whether defendant is required to have a license in order to recover on a breach of contract from plaintiff. As noted in *Styne v. Stevens, supra*, "controversies colorably arising under the Talent Agencies Act are within the exclusive original jurisdiction of the Commissioner," whether raised by

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[4] Plaintiff is a resident of Florida, employed in Texas, and signed the arbitration agreement in Nevada.

the party bringing an action or as a defense. (26 Cal.4th at p. 59.) The fact that the losing party will have a right to a de novo hearing, involving additional time and money, does not excuse the defendant from the legal requirement to exhaust his administrative remedies.

The order is affirmed.

JACKSON, J.*

I concur: MALLANO, Acting P. J.

VOGEL, J., Dissenting.

When a former judge and a lawyer enter a contract in which they agree that any dispute about that contract will be resolved by arbitration, I think they ought to be bound by that agreement.

A.

On March 7, 2002, Arnold M. Preston (a lawyer) and Alex E. Ferrer (a former lawyer and former Florida trial judge who now decides cases for a television series, "Judge Alex") signed a six-page "Personal Management Agreement" in which Ferrer agreed to pay Preston 12 percent of his earnings from "Judge Alex" in consideration for Preston's services as a personal manager, and to arbitrate any dispute about the terms of the contract or its "validity or legality."[5]

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[5] As relevant, the arbitration provision provides: "In the event of any dispute under or relating to the terms of this agreement, ***or the breach, validity, or legality thereof***, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the

Although Ferrer modified several of the contract's provisions (by handwritten interlineations and other markings), he made no changes to the arbitration provision. He initialed every page. In 2005, Ferrer refused to pay Preston's fees.

On June 10, 2005, Preston filed a demand for arbitration with the American Arbitration Association, seeking damages for breach of contract based on Ferrer's failure to pay his fees. Ferrer's lawyer appeared in the arbitration and defended the action for six months, during which he moved (successfully) for the recusal of the arbitrator first assigned to decide the dispute, moved (unsuccessfully) for a stay of the arbitration proceedings,[6] and participated in a scheduling conference at which the second arbitrator set the arbitration hearing for January 26, 2006.

On July 5, 2005, Ferrer filed a petition with the Labor Commissioner, alleging among other things that Preston was acting as an unlicensed talent agent in violation of the Talent Agencies Act (Lab. Code, § 1700 et seq.), not as a personal manager, and claiming the contract was void. On the same day, Ferrer (by motion) asked the Commissioner to stay the arbitration proceedings. On November 8, the Commissioner denied the motion on the ground that he lacked jurisdiction

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said association, and judgment upon the award rendered by the arbitrator(s) may be entered into any court having jurisdiction thereof. . . ." (Emphasis added.)

[6] The motion for a stay was filed with the arbitrator on July 1, 2005, on the ground that Ferrer intended to -- but had not yet -- filed a petition asking the Labor Commissioner of the State of California to determine the controversy. The arbitrator denied the motion because its merits could not be determined without an evidentiary hearing.

to stay an arbitration.

Undeterred, Ferrer filed the superior court action now before us, seeking a declaration that the dispute is not subject to arbitration and an injunction staying the arbitration proceedings. Preston appeared and filed a motion to compel arbitration. Ferrer filed a motion for a preliminary injunction. Ferrer prevailed -- the trial court denied Preston's motion to compel arbitration and issued a preliminary injunction staying the arbitration proceedings.

In none of these proceedings did Ferrer challenge the validity of the arbitration clause.

B.

When fully informed parties with equal bargaining power agree to arbitrate any dispute that arises out of their business dealings because arbitration is an efficient, expeditious, economical and fair means of resolving their dispute, their agreement ought to be enforced. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702-703, 706-707.) When the arbitration agreement includes a clear, express, and unequivocal agreement that the arbitrator shall decide jurisdictional issues -- that is the "validity" and "legality" of the contract -- that agreement ought to be enforced. (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1249 [a court may not consider a claim that an arbitration provision is unenforceable if it is a subterfuge for a challenge to the entire agreement because that contention must be submitted to the arbitrator].) In my view, *Styne v. Stevens* (2001) 26 Cal.4th 42 supports my interpretation, not the views

expressed by my colleagues.

There was no arbitration provision in the *Styne* contract, and the issue decided there was that, in a lawsuit arising under the Talent Agencies Act, the dispute must be referred to the Labor Commissioner, and the proceedings before the Commissioner must be concluded before the parties can proceed *to the superior court*. (*Style v. Stevens, supra,* 26 Cal.4th at pp. 54-56.) Indeed, the Supreme Court expressly rejected an argument that its holding would undermine similar contracts with arbitration provisions, noting that "[n]othing in [its] reasoning restricts" the parties' right to provide in their contract that their disputes shall be resolved by private arbitration rather than by the Commissioner. (*Id.* at p. 59, fn. 9.)

My colleagues, assuming their own conclusion, dismiss this language on the ground that the arbitration provision before us does not conform to the Talent Agencies Act's requirements as set out in Labor Code section 1700.45. (Maj. opn., p. 6, fn. 2.) Their approach ignores the fact that the parties signed a "Personal Management Contract," not a Talent Agent's Contract, and the only reason the Talent Agencies Act is relevant is that Ferrer claims the agreement is not what it appears to be and that Preston was in fact acting as an unlicensed talent agent. Based on the parties' agreement, this threshold issue -- which quite plainly has to do with the "validity" and "legality" of the contract -- must be decided by the arbitrator, not the Commissioner or the trial court. (Cf. *Buckeye Check Cashing, Inc. v.*

Cardegna (2006) ___ U.S. ___ [126 S.Ct. 1204, 1210]; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444.)[7] If after an evidentiary hearing the arbitrator agreed that Ferrer had raised a colorable defense (that Preston was wrongfully acting as an unlicensed talent agent), the arbitrator would then determine whether the arbitration provision substantially complied with Labor Code section 1700.45 (keeping in mind that Ferrer has never challenged the validity of the arbitration clause). If the arbitrator found substantial compliance, he would determine the dispute. If not, the arbitrator would dismiss the arbitration proceedings, leaving the parties

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[7] *Buckeye* establishes "three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. [Because the challenge in this case is to the] Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." (*Buckeye Check Cashing, Inc. v. Cardegna, supra,* 126 S.Ct. at p. 1209.) Because it is undisputed (correctly) that the contract before us is governed by the FAA (*Higgins v. Superior Court, supra* 140 Cal.App.4th at p. 1247), it follows necessarily that the arbitrator and not the court must determine the gateway issues. My colleagues' contrary conclusion -- based on the fact that the *Buckeye* court did not consider whether the issue should go first to a state administrative agency -- ignores *Buckeye's* holding that its rules trump conflicting state procedures. *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347 -- a case that is almost 40 years old and based on a different statutory scheme -- did not have an arbitration provision that vested the arbitrator with jurisdiction to determine the threshold questions at issue in this case and *Buchwald* thus provides no authority for the majority's conclusion. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1081, fn. 3 [cases are not authority for propositions not considered].) I also question whether *Buchwald* survives *Buckeye*.

to exhaust their administrative remedies before the Commissioner, then ultimately resolve their dispute in the superior court.

Instead of the speedy, efficient, and relatively inexpensive procedure contemplated by the parties' contract, my colleagues have permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures. (Lab. Code, §§ 98.2, 1700.44, subd. (a); *Sinnamon v. McKay* (1983) 142 Cal.App.3d 847, 850 [the Labor Commissioner's findings are not binding, and each party has a right to trial de novo in the superior court].) That is not how it is supposed to work.[1]

I would reverse, and direct the trial court to grant Preston's petition for arbitration and stay both the court proceedings and the proceedings before the

Commissioner pending the arbitrator's decision.

VOGEL, J.

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[1] There is yet another reason to reverse. Ferrer established his "colorable" defense under the Talent Agencies Act by argument, not by evidence, and the trial court then relied on the existence of this defense to support its decision to issue a preliminary injunction staying the arbitration proceedings. Put another way, there is no evidence at all to support issuance of the preliminary injunction, and this fact alone requires reversal. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 441-442 [a preliminary injunction must be supported by evidence establishing the moving party's probability of success on the merits]; *Higgins v. Superior Court, supra,* 140 Cal.App.4th at p. 1249 [the party opposing a petition to compel arbitration bears the burden of proving by a preponderance of evidence any facts necessary to his defense].)

Appendix C

Superior Court of the State of California
for the County of Los Angeles

ALEX E. FERRER,	)	Case No. BC342454
	)	
Plaintiff	)	ORDER
	)	
vs.	)	
	)	
ARNOLD PRESTON,	)	
	)	
Defendant	)	
	)	

Motion of Defendant to Compel Arbitration;

Motion of Plaintiff for Preliminary Injunction;

Motion to compel arbitration is denied; motion for preliminary injunction is granted.

This case arises from a claim for fees: Defendant Arnold M. Preston alleges that Plaintiff Alex E. Ferrer breached a written contract by failing to pay Defendant certain fees based on Plaintiff's earnings from his performance in a television program entitled "Judge Alex."

On June 10, 2005, Defendant filed an arbitration demand with the American Arbitration Association. Defendant provides a copy of the agreement on which the suit is based. Both sides acknowledge that they entered into the agreement. Paragraph 13 of the agreement provides:

> "In the event of any dispute under or relating to the terms of this agreement, or the breach, validity, or legality thereof, it is agreed that the same shall be submitted to arbitration by the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s), may be entered into any court having jurisdiction thereof." (Motion to Compel, Exhibit B).

Plaintiff moved the Arbitrator on July 1, 2005 for an order staying the arbitration pending the disposition of Plaintiff's petition to determine controversy before the Labor Commissioner. Plaintiff's motion to stay was made pursuant to Labor Code §1700.44 and §1700.45, section 12022 of the California Code of Regulations, and *Styne v. Stevens* (2001) 26 Cal.4th 42. (Motion to Compel, Exh. C).

Plaintiff filed a motion to stay the arbitration and a petition to determine controversy with the Labor Commissioner on July 5, 2005. This motion was premised on the same grounds as Plaintiff's motion to stay brought before the Arbitrator.

The Arbitrator denied Plaintiff's motion on October 12, 2005 and set the hearing on the merits for January 26, 2005, stating:

> "Applicable authority cited by both parties acknowledges that 'the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner.' (§1700.45). *Styne v. Stevenson*, 26 Cal.4th 42, 58, fn.9 (2001). Furthermore, the motion was predicated upon a favorable resolution of disputed questions

of fact which cannot be determined at this time without evidence or hearing." (Motion to Compel, Exh. D.)

On November 2, 2005, Plaintiff filed this action against Defendant seeking (1) Declaratory Relief, and (2) Preliminary and Permanent Injunctions.

On November 8, 2005, the Labor Commissioner denied Plaintiff's motion to stay "on the grounds that the Labor Commissioner does not have the authority to stay arbitration proceedings. Such a motion must be made directly to the arbitrator or to the superior court." (Opposition to Preliminary Injunction, Exh. F). The Labor Commissioner also denied Defendant's motion to dismiss the case for lack of subject matter jurisdiction and scheduled a March 6, 2006 hearing on the matter, citing *Styne* and ruling that "this case presents a colorable basis for exercise of the Labor Commissioner's jurisdiction and therefore, the matter must be submitted to the Labor Commissioner for determination." (*Id.*)

Plaintiff moves this court for an order, under C.C.P. §526, C.C.P. §527 and Labor Code §1700.00-1700.47, preliminarily enjoining Defendant from proceeding with the pending arbitration against Plaintiff unless and until the Labor Commissioner determine that he or she is without jurisdiction over the disputes between Preston and Ferrer.

Defendant moves this court for an order under C.C.P. §1281.2 compelling arbitration based on a written arbitration agreement.

The main issue before the Court is whether or not Labor Code §1700.45 permits arbitration under the circumstances of this case, despite §1700.44's grant of

original jurisdiction to the Labor Commissioner over "controversies arising under this chapter."

1. Motion to Compel Arbitration

Labor Code 1700.45

Defendant argues, and Plaintiff does not dispute, that the signed written agreement between the parties contains an agreement to arbitrate under the rules of the AAA. (Motion 4:11–13; Exhibit B, ¶13).

Plaintiff argues that the contract's arbitration provision does not confer jurisdiction on the Arbitrator to resolve the parties' disputes as to the validity of the contract because jurisdiction lies exclusively with the Commissioner. (Opposition 2:26–27; 3:1–2).

Further, Plaintiff argues that even if an arbitrator has authority to determine the issue of a contract's validity where the contract meets the requirements of Labor Code §1700.45, the contract at issue here does not meet those requirements. (Opposition 6:14–17). Plaintiff contends that the contract does not meet the requirements of §1700.45(a) because (1) Defendant does not assert that he ever was or acted as a talent agency, (2) the contract does not comply with the Act's requirements for 'contracts for the services of talent agencies" set forth in Section 1700.23 of the Act, and (3) there is nothing in the contract that provides or suggests that Defendant "undertakes to endeavor to secure employment" for Plaintiff. (Opposition 7:14–25; 8:1–6).

Labor Code §1700.45(a) provides:

Notwithstanding Section 1700.44, a provision in a contract providing for the decision of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid: (a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment....

Labor Code §1700.45(b)–(d) apply only if the arbitration agreement is pursuant to a collective bargaining agreement.

Buchwald v. Katz (1967) 254 Cal.App.2d 347

Plaintiff contends that the agreement is void because Defendant attempted to procure employment for Plaintiff while not licensed as a talent agent by the Labor Commissioner. (Opposition 1:8–9). In addition, Plaintiff argues that *Buchwald v. Katz* (1967) 254 Cal.App.2d 347 establishes that if a contract is void under the Talent Agencies Act, its arbitration clause is also invalid. (Opposition 4:1–2).

In *Buchwald,* defendant, Matthew Katz, claiming unpaid fees, commenced arbitration before the AAA, as provided for in the contracts with plaintiffs, with members of the musical group, Jefferson Airplane. Jefferson Airplane filed a petition to determine controversy with the Labor Commissioner. While the petition was pending, Jefferson Airplane filed an action against Katz in superior court, seeking to restrain him from proceeding with the arbitration. Katz countered with a motion to compel arbitration and to restrain the proceedings before the Labor Commissioner. The superior court compelled arbitration and enjoined the

proceedings before the Labor Commissioner. (254 Cal.App.2d at 353).

The Court of Appeal reversed, holding that the argument for arbitration "overlooks the basic contention of petitioners that their agreement with Katz is wholly invalid because of his noncompliance with the Act. If the agreement is void no rights, including the claimed right to private arbitration, can be derived from it." (*Id.* at 360).

Jefferson Airplane presented both to the superior court and to the Labor Commissioner "evidence" in support of their contentions that Katz had agreed to and had in fact procured employment for Jefferson Airplane without a license and without having the contracts approved by the Labor Commissioner. (*Id.* at 353). The Court stated that Jefferson Airplane's "petition filed with the labor commissioner alleges facts which if true indicate that the written contracts were but subterfuges and that Katz had agreed to, and did, act as an artists' manager" (*Id.* at 355) and that "a prima facie showing was made to the labor commissioner that Katz had so agreed and had so acted [as an artist's manager]." (*Id.* at 360).

Here, the Labor Commissioner has found that Plaintiff, in his petition to determine controversy, has presented a "colorable" claim that the Talent Agencies Act applies and has been violated by Defendant. In his petition, Plantiff alleges that Defendant procured employment for Plaintiff. (Motion for Preliminary Injunction, Exh. B.)

Here, the contract between the parties does not provide for Defendant to procure employment for Plaintiff. (Motion, Exhibit B). In fact, Defendant disputes that he is a "talent agent" and denies that he procured employment for

Plaintiff. Therefore, the contract does not fall under Labor Code §1700.45(a), and that section specifically provides that "a provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure."

Styne v. Stevenson (2001) 26 Cal.4th 42

Styne at fn. 9 states: "the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner (§1700.45). Nothing in our reasoning restricts this right." 26 Cal.4th at 58, fn.9. Plaintiff contends that *Styne* does not overrule *Buchwald*. (Opposition 5:10).

Buchwald appears to stand for the proposition that an allegation that respondent is acting as an artist's manager (talent agent here) without a license is enough for the Talent Agencies Act to apply to the underlying contract. The text of *Styne* does not disagree. It stands for the proposition that when the Talent Agencies Act is invoked in the course of a contract dispute, the Labor Commissioner has exclusive jurisdiction over the matter, including whether the contract involved the services of a talent agent. *Styne* cites extensively to *Buchwald* and never disapproves it.

Further, the Labor Commissioner has determined that Plaintiff has a "colorable claim" under the Talent Agencies Act and *Styne* holds that "the Commissioner, whose interpretation of a statute he is charged with enforcing deserves substantial weight." (26 Cal.4th at 53).

Defendant refers to footnote 9 on page 58 of *Styne* and argues that it provides that arbitration is available under the circumstances of this case notwithstanding *Buchwald*. However, it appears that the footnote means that §1700.45 makes arbitration available for disputes under §1700.44, but only when it is undisputed that the dispute is between a "talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment..." (1700.45 (a)). *Buchwald* is consistent with this conclusion (254 Cal.App.2d at 373).

The Artist's Managers Act

Defendant further argues that *Buchwald* is not applicable as it was decided under a repealed statute, the "Artist's Managers Act." Defendant argues that the Talent Agencies Act eliminated the requirement that managers must have a license. (Reply 2:1–14). That is irrelevant.

The Artist's Managers Act and the Talent Agencies Act are closely similar in relevant respects. While they differ slightly in the definitions of "artist's manager" and "talent agent," both are primarily aimed at requiring that anyone who procures employment for an "artist," as defined by statute, is licensed. (*See* Labor Code §1700.5, and the Artist's Managers Act Section 1700.5). Sections 1700.44 and 1700.45 of both are identical in relevant points.

"It is a cardinal principal of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment." *Greve v. Leger, Ltd.*, (1966) 64 Cal.2d 853, 965.

Waiver/Estoppel

Defendant argues that over the past six months Plaintiff has actively participated in the arbitration and thereby waived his objection to arbitration. (Motion 3:4–19). Yet, Defendant presents no authority in support of this argument.

"Territorial Jurisdiction"

Defendant also argues that Plaintiff has not demonstrated the "territorial jurisdiction" of the Talent Agencies Act: he claims that Plaintiff is a resident of Florida, employed in Texas, and signed the arbitration agreement in Nevada, and has not adduced territorial-jurisdictional facts to show the California Labor Code applies to him. (Motion 5:15; 6:1-4).

Defendant presents no authority in support of this argument.

2. Motion for Preliminary Injunction

Plaintiff moves the Court for an order preliminarily enjoining Defendant from proceeding with the pending arbitration against Plaintiff unless and until the Labor Commissioner determines that he or she is without jurisdiction over the disputes between Preston and Ferrer.

The parties present the same arguments in support of and in opposition to this motion as they do in respect to Defendant's motion to compel arbitration.

Therefore, in light of the Court's ruling above, and the need to avoid inconsistent rulings on the same issues and

between the same parties, the motion for preliminary injunction is granted.

Dated: December 7, 2005

Haley J. Fromholz,
Judge of the Superior Court